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SUPREME COURT OF THE UNITED STATES

October Term, 1993

HOECHST CELANESE CORPORATION
and
HOECHST CELANESE RETIREMENT PLAN,
Cross-Petitioners.

v.

LEONARD GILLIS, VALDO A. SARGENI,
for Themselves and All Others Similarly Situated,
Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether early retirement subsidies, the preconditions to which have not yet been, nor can ever be, satisfied, are "accrued" benefits that must be protected at the time of a *de facto* amendment to or termination of a defined benefit pension plan?

LIST OF PARTIES

The parties in the court of appeals were Leonard Gillis and Valdo A. Sargeni, respondents herein, Hoechst Celanese Corporation and the Hoechst Celanese Retirement Plan, cross-petitioners herein. Messrs. Gillis and Sargeni brought their claims on behalf of a class of similarly-situated former employees of Hoechst Celanese Corporation.

Hoechst Celanese Corporation is a wholly-owned subsidiary of Hoechst Corporation and Hoechst A.G., a German corporation. Hoechst-Roussel Pharmaceuticals Inc. is a subsidiary of the Hoechst Celanese Corporation.

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OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of summary judgment for respondent Hoechst Celanese Corporation ("Hoechst Celanese") on the issue raised in this cross-petition is reported at 4 F.3d 1137 (3d Cir. 1993), and is reproduced in the appendix attached hereto, "Pet. App." at A-1. The district court's opinion, granting Hoechst Celanese summary judgment on that same issue, is reported at 818 F. Supp. 805 (E.D. Pa. 1992), and is reproduced in the appendix, Pet. App. at A-31. The court of appeals' order denying the parties' rehearing petitions is not reported, and is reproduced in the appendix, Pet. App. at A-43.

JURISDICTION

The judgment of the court of appeals was filed on September 7, 1993 (Pet. App. at A-2), and a timely-filed petition for rehearing was denied by order dated October 6, 1993 (Pet. App. at A-43). This cross-petition is being filed under Supreme Court Rule 12.3 and within 30 days of receipt, on January 7, 1994, of a related writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1993).

STATUTES INVOLVED

The pertinent statutory provisions are sections 204(f) and (g), and section 208 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001-1461 (West 1983), as amended, and are set forth in full in the appendix hereto (Pet. App. at A-45).

STATEMENT OF THE CASE

Petitioners are Hoechst Celanese Corporation and the Hoechst Celanese Retirement Plan. Respondents, Leonard Gillis and Valdo A. Sargeni, are former salaried employees of the Delaware City, Delaware, PVC Division of Hoechst Celanese. During the course of their employment with Hoechst Celanese, respondents were participants in the Hoechst Celanese Retirement Plan (the "Plan"), a single-employer defined benefit pension plan. The Plan provides, among other things, an unreduced early retirement benefit under the "Rule of 85," *i.e.*, where age (at least 55 years) and service to Hoechst Celanese total 85 or more. Eligibility under the Plan is limited to "salaried or hourly employee[s] (other than a temporary employee)" of Hoechst Celanese.

In September 1989, Hoechst Celanese sold the Delaware City facility, where respondents worked, to MX Holdings, Inc. and its nominee, American Mirrex Corporation ("American Mirrex"). Pursuant to the asset sale agreement, petitioners were offered the same jobs with American Mirrex, at the same pay. Moreover, the

sale agreement recited that the "[b]uyer's pension plan for salaried employees shall, for at least two (2) years, be designed to provide substantially similar benefits as Hoechst Celanese's plan." Hoechst Celanese further covenanted to transfer to the nascent American Mirrex pension plan assets sufficient to satisfy its obligations under ERISA and the Internal Revenue Code. It is undisputed that, at the time of the sale, *neither* of the respondents satisfied the age and service requirements for Rule of 85 benefits as defined in the Hoechst Celanese Plan.

Following the sale, petitioners commenced an action against Hoechst Celanese and the Plan in the United States District Court for the Eastern District of Pennsylvania alleging, *inter alia*, that the defendants violated ERISA section 208, 29 U.S.C.A. § 1058 (West 1985), by "failing to protect and preserve the right to retirement after 85 years of combined age and service." As refined through the discovery process, respondents claimed that the pension plan asset transfer did not include funds sufficient to pay the Rule of 85 early retirement subsidy, assuming that every former Hoechst Celanese employee would ultimately "qualify" for the early retirement subsidy while working for American Mirrex.

In response to Hoechst Celanese's motion for summary judgment, and relying on the Third Circuit's opinion in *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991), the district court held that, because respondents had not satisfied the Plan's age and service requirements at the time of the sale, these benefits were not yet accrued and, as such, Hoechst Celanese need not have transferred additional assets reflecting the early retirement subsidy to the start-up American Mirrex plan. *See Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 810-11 (E.D. Pa. 1992) (Pet. App. at A-39-41).

On appeal, the Third Circuit endeavored to distinguish *Berger* and, finding controlling materials extrinsic

to ERISA (described in Judge Stapleton's opinion as having "nothing to do with the" relevant ERISA sections) held that these former employees were *not* "separated from [Hoechst Celanese's] service" and, therefore, could later "grow into" these benefits by working for American Mirrex. *Gillis*, 4 F.3d at 1146-47 (Pet. App. at A-17-18). In other words, despite the fact that the respondents no longer worked for Hoechst Celanese, these former participants, according to the Third Circuit, could somehow later qualify for the early retirement subsidy. Although such benefits need not be protected upon a plant closing (*e.g.*, *Berger*), Hoechst Celanese must, at the time of the sale of its business, transfer assets sufficient to fund the subsidy as the respondents "can continue to accumulate years of service while working for American Mirrex – the successor employer." *Id.*

REASONS FOR GRANTING THE WRIT

A.

This petition raises an important issue that has vexed the circuit courts since the 1974 adoption of ERISA, *i.e.*, whether early retirement subsidies, the preconditions to which have not yet been, nor can ever be, satisfied, are "accrued" benefits that must be protected at the time of a *de facto* amendment to or termination of a defined benefit pension plan. Here, the Third Circuit held, in the context of a sale of a division of a plan sponsor, that such unvested early retirement benefits are accrued and must be protected (although no such obligation would arise had the plan sponsor simply closed the plant). Unfortunately, the Third Circuit's decision in *Gillis*, which is at odds with all other pertinent circuit authority, makes plant closures economically more attractive than sales to a buyer offering continuing employment. To find such a perverse financial incentive in the interstices of ERISA converts a law designed to protect private pension rights into a scheme

encouraging a disregard for the very rights sought to be protected. This Court should grant the petition to resolve the conflict in circuit authority and finally to create a nationwide uniform rule on this issue of great importance to the nation's private pension plan sponsors.

The result in *Gillis* is plainly inconsistent with those sections of ERISA defining accrued benefits for purposes of a pension asset transfer under ERISA section 208, 29 U.S.C.A. § 1058.[1] Such result-oriented jurisprudence flies in the face of this Court's repeated admonition that ERISA must be strictly construed to avoid embellishing the statute with rights and remedies not contemplated by Congress. Further, *Gillis* has been expressly rejected by the Eighth Circuit in *Hunger v. AB*, No. 92-2729, 1993 U.S. App. LEXIS 32743 (8th Cir. Dec. 17, 1993), and is at odds with the Sixth Circuit's opinion in *Cattin v. General Motors Corp.*, 955 F.2d 416 (6th Cir. 1992), and the Fifth Circuit's opinion in *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686 (5th Cir.), *cert. denied*, 114 S. Ct. 382 (1993). Moreover, this split in circuit authority reflects an unfortunate continuation of a debate surrounding the protection afforded early retirement subsidies, despite Congress' efforts to clarify the law in 1984.

The Third Circuit has unwittingly impressed, without any statutory basis, an additional cost on the sale of plants and divisions. Equally pernicious is the possibility that rulings such as *Gillis* will further the move away from defined benefit pension plans toward defined contribution plans, *i.e.*, 401(k) plans. In defined contribution plans, the employee, not the employer, bears the investment risk. This results in uncertainty regarding the amount of employees' ultimate pension entitlement and thereby undermines ERISA's goal of increasing

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1. It is something of a misnomer to make reference to a "ruling" in *Gillis*. Two judges wrote separately on the early retirement issue to form a "majority" and one judge dissented and filed a separate opinion.

employees' certainty in their retirement income. Unfortunately, the panel's ruling may ultimately lead to a decline in the availability of such defined benefit pension plans.[2]

The language of ERISA as it has evolved through amendments, read alongside this Court's rulings, compels the conclusion that the Third Circuit's construction of the relevant statutory provisions is flawed. Most fundamentally, a plan participant may gain entitlement to early retirement benefits only by giving service, or consideration, to a plan sponsor. This principle, derived from the explicit statutory command, circumscribes a plan sponsor's liability for early retirement to its then current employees who satisfy the applicable preconditions to benefits under the plan document. Until the plan requirements are satisfied (typically age and service), no liability for early retirement attaches. Nevertheless, the Third Circuit's ruling in *Gillis* requires plan sponsors (like Hoechst Celanese) to pay for benefits the preconditions to which will *never* be satisfied.

ERISA section 208, 29 U.S.C.A. § 1058, defines the duties arising upon a transfer of plan assets:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any

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2. Notwithstanding the fact that at least three circuit courts disagree with the ruling in *Gillis*, the mischief of the opinion will extend beyond the borders of the Third Circuit. ERISA's expansive jurisdictional provision allows for suit wherever a defendant "may be found" or where the "breach took place." ERISA § 502(e)(2), 29 U.S.C.A. § 1132(e)(2) (West 1985). Hence, future plaintiffs, by suing in the Third Circuit, may readily circumvent unfavorable circuit authority elsewhere, so long as the defendant is found to have minimum contacts with the Third Circuit (an easy task given the number of Delaware corporations) or the plaintiff resides there. *E.g.*, *Varsic v. United States District Court*, 607 F.2d 245, 248 (9th Cir. 1979)("Congress' choice of this term ['found'] for inclusion in the ERISA venue provision further supports our conclusion that the provision is intended to expand, rather than restrict, the range of permissible venue locations."); *see also Bonin v. American Airlines, Inc.*, 621 F.2d 635, 636 n.1 (5th Cir. 1980)("A potential ERISA plaintiff is granted a wide choice of federal court venue. . . .").

> other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

Id. (Pet. App. at A-46). Treasury regulations provide that the "benefits" that must be transferred "on a termination basis" are limited to "accrued benefits."[3]

The narrow issue posed, and the plain conflict presented, involves whether unvested early retirement benefits are "accrued" for purposes of ERISA section 204(g) and thus must be reflected in an asset transfer under ERISA section 208. That issue, in turn, requires examination of the construction given amendments to ERISA contained in the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) ("REA"). Prior to Congress' passage of REA, circuit courts split on whether ERISA protected early retirement benefits. As this petition demonstrates, the split in circuit decisional authority pre-dates REA and the 1984 amendment to the statute was intended to but did not resolve this dispute.[4]

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3. The Treasury Regulations state:

> If the sum of the assets of all plans is not less than the sum of the present values of the *accrued benefit* (whether or not vested) of all plans, the requirements of section 414(1) will be satisfied merely by combining the assets and preserving each participant's *accrued* benefits.

See Treas. Reg. 1.414(1)-1(e)(1) (emphasis added)

4. *E.g.*, *Tilley v. Mead Corp.*, 927 F.2d 756, 760 (4th Cir. 1991) (construing pre-REA plan, holding that subsidies were not protected), *cert. denied*, 112 S. Ct. 3013 (1992); *Bencivenga v. Western Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir. 1985) (same). *Contra Amato v. Western Union Int'l, Inc.*, 773

With the passage of REA in 1984, ERISA § 204(g), 29 U.S.C.A. § 1054(g) (West 1985), was amended to read:

> **(g) Decrease of accrued benefits through amendment of plan.** (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of —
>
> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations),
> >
> > . . .
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Id. (Pet. App. at A-45).[5] The plain language of ERISA provides that an early retirement subsidy is protected only to the extent that a participant "satisfies . . . the preamendment conditions for the subsidy." *Id.* In other words, while a plan sponsor may elect to amend a plan to eliminate such a subsidy, a participant, by giving further

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NOTES *(Continued)*

F.2d 1402, 1414 (2d Cir. 1985) (subsidies protected), *cert. dismissed*, 474 U.S. 1113 (1986); *Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir.) (same), *cert. denied*, 471 U.S. 1137 (1985).

5. An "early retirement benefit" is accorded greater protection under REA than is a "retirement-type subsidy." Rule of 85 benefits are, according to the Senate Report accompanying section 204(g), retirement-type subsidies. S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574-75.

service to the original sponsor, may eventually qualify for the benefit.

The preceding subsection, 204(f), underscores the fact that protection extends only to those who later give further service, or consideration, to the plan sponsor:

> **(f) Employer treated as maintaining a plan.** For the purposes of this part *an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.*

29 U.S.C.A. § 1054(f) (West 1985) (emphasis added) (Pet. App. at A-45). In sum, and as this Court has recognized, ERISA works to ensure that pension benefits extend only to those who have satisfied the preconditions to entitlement spelled out in the governing plan documents.[6]

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6. *E.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) ("Congress through ERISA wanted to insure that 'if a worker had been promised a defined pension benefit upon retirement — *and if he has fulfilled whatever conditions are required to obtain a vested benefit* — . . . he actually receives it.' ") (emphasis added) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980)). This principle — that plan language determines whether a benefit is vested — formed the basis of Judge Stapleton's dissent in *Gillis*:

> The employees with respect to whom the plan is being terminated are going to work for the third party and will never render the service to Hoechst [Celanese] that it bargained for when it created the early retirement benefit. As a result, no early retirement benefit would be payable to the plaintiffs upon a termination immediately prior to the transfer, and it is immaterial if the funds available after the transfer are insufficient to fund early retirement benefits for plaintiffs under the Hoechst [Celanese] plan.

Gillis, 4 F.3d at 1152 (Pet. App. at A-29). In fact, the ruling in *Gillis* evidences a related circuit conflict on a more fundamental issue, *i.e.*, whether specific plan language limiting vesting (the sanctity of which is recognized in ERISA section 204), or the Third Circuit's

B.

Despite ERISA's unambiguous statutory command, the Third Circuit, looking to materials extrinsic to *unrelated* sections of the Internal Revenue Code, held, although these petitioners can never satisfy the requirements for benefits under the Hoechst Celanese Plan, they may later "grow into" the early retirement subsidy while working for American Mirrex. Accordingly, under the Third Circuit's rule, the pension plan asset transfer must reflect the additional amounts necessary to fund the benefit:

> We agree with the reasoning of the *Hollingshead* [*v. Burford Equip. Co.*, 809 F. Supp. 906 (M.D. Ala. 1992)] court that an employee is not separated from service if the employee continues on in the same job for a successor employer. There is no dispute that plaintiffs continued in their same jobs for American Mirrex. Thus, we conclude that plaintiffs were not separated from service and they continued to accumulate years of service while working for American Mirrex – the successor employer.

Gillis, 4 F.3d at 1147 (Pet. App. at A-18).[7]

NOTES *(Continued)*

jumbled amalgamation of ERISA and unrelated Internal Revenue materials, should determine a plan participant's entitlement to early retirement benefits. *E.g.*, *DeNobel v. Vitro Corp.*, 885 F.2d 1180, 1193 (4th Cir. 1989) (ERISA "imposes no obligation on a plan to pay benefits before an employee reaches normal retirement age. Any right to earlier benefits and a particular method of payment *must be found in the individual agreements*.") (quoting *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983)).

7. In his separate concurring opinion, Judge Alito looked to an Internal Revenue Ruling that, consistent with section 204(g), requires that employees remaining in a plan sponsor's employ be given an opportunity to qualify for early retirement notwithstanding the elimination of the subsidy. *Gillis*, 4 F.3d at 1150 (Pet. App. at A-26). From there, it appears, Judge Alito reasoned that these benefits must be protected upon an asset transfer under ERISA

Gillis is directly at odds with the express language of the statute and, not surprisingly, all of the circuit court opinions addressing the question since the adoption of REA. Most recently, the Eighth Circuit, in *Hunger v. AB*, No. 92-2729, 1993 U.S. App. LEXIS 32743 (8th Cir. Dec. 17, 1993), summarily rejected *Gillis* on the basis of the clear terms of the statute. According to *Hunger*, plaintiffs' inability to earn additional age and service credits toward the early retirement subsidy, once their division was sold, precluded them from satisfying the preconditions to the benefit. Quite simply:

> once the participants began their employment with JPI [the new employer], they were no longer employed by Clevite and were thus unable to satisfy the Plan's express eligibility conditions.

Id. at * 7-8.

Moreover, ERISA section 204(g) does not work to protect the subsidy:

> Because the appellants are no longer employed by Clevite, as expressly required by the conditions of the Plan, they are unable to satisfy the preamendment eligibility conditions and section 204(g) will not serve to preserve their entitlement to the early retirement subsidy.

Id. at * 8.

Given ERISA's explicit command, the Third Circuit's opinion here did not long detain the Eighth Circuit:

> We find the appellants' reliance on *Hoechst [Celanese]* to be unpersuasive. First, *because*

NOTES *(Continued)*

section 208. *Id.* Judge Alito thus overlooked the fact that ERISA sections 204(f) and (g) require continuing service to Hoechst Celanese, the original plan sponsor, to later qualify for the benefit.

> *the plain language of section 204(g) applies only to a "participant who satisfies . . . the preamendment conditions for the subsidy," we find it unnecessary to resort to the legislative history* in order to decide the question presented under the facts of this case . . . Here, the Plan expressly provides that the participant may only acquire age and service credits while employed with Clevite. The appellants' transfer to JPI now prevents them from satisfying the express conditions of the Plan.

Id. at * 10-11 (citation omitted) (emphasis added).[8]

Gillis also conflicts directly with the Sixth Circuit's opinion in *Cattin v. General Motors Corp.*, 955 F.2d 416 (6th Cir. 1992). Plaintiffs in *Cattin* were former employees of the GM data processing department transferred to EDS, a subsidiary of GM. The GM/EDS merger agreement provided that these EDS employees would no longer participate in the GM retirement plan. Following the transfer, plaintiffs were unable to qualify for certain early retirement benefits paid as social security supplements.

Rejecting the participants' claim that section 204(g) protects the benefits, the Sixth Circuit held, again contrary to the later decision in *Gillis*:

> Likewise, in this case, the social security supplements are not an accrued benefit because *plaintiffs did not meet the prerequisites under*

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8. The Eighth Circuit incorrectly further distinguished *Gillis* on the grounds that the successor:

> American Mirrex would provide substantially the same employee benefits as those Hoechst [Celanese] had provided. Thus the employee/plaintiffs were subsequently employed by the plan sponsor that had assumed both the obligations and assets of the retirement plan.

Hunger, 1993 U.S. App. LEXIS 32743 at * 11. Contrary to the Eighth Circuit's observation, American Mirrex covenanted only to maintain "substantially similar" benefits plans for two years and made no specific promise regarding Rule of 85 benefits.

> *the plan for receiving the supplements before the amendment of the plan*. [Section 204(g)(2)] offers plaintiffs no relief from the plan amendment because they did not meet the conditions necessary to entitle them to the social security supplements before GM amended the plan.

955 F.2d at 424.

Lastly, the court in *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686 (5th Cir.), *cert. denied*, 114 S. Ct. 382 (1993), also recognized the need to satisfy the plan's preconditions to benefits before benefits will be deemed accrued and need be monetized in an asset transfer. Affirming a grant of summary judgment in favor of participants, the *Harms* court held:

> As noted above, section 204(g) prohibits the elimination or reduction of the Supplement C benefits by plan amendment "with respect to a participant who satisfies (*either before or after the amendment*) the preamendment conditions for the subsidy." 29 U.S.C. § 1054(g)(2) (emphasis added). It is undisputed that the beneficiaries met the age and service requirements imposed by Supplement C at the time of their termination.

Id. at 692.[9]

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9. Although not arising in the context of an asset transfer, the Seventh Circuit's recent opinion in *Meredith v. Allsteel, Inc.*, No. 92-3997, 1993 U.S. App. LEXIS 32032 (7th Cir. Dec. 9, 1993), scrutinizing post-REA amendments to a pension plan, further demonstrates the conflict in circuit decisional authority. Looking to pre-REA case law, the Court held:

> The *plain language* of ERISA leads to the inescapable conclusion that early retirement benefits are not accrued benefits. ERISA Section 204(g), 29 U.S.C. § 1054(g), prohibits amendments to a pension plan which have the effect of reducing "accrued benefits."

Id. at * 16 (emphasis added). *See also Berard v. Royal Elec. Inc.*, 795 F. Supp. 519, 527 (D.R.I. 1992) ("[A]n employee cannot 'grow into'

C.

The current uncertain economic climate makes the issue raised in this petition compelling. Unfortunately, the confusing and inconsistent rulings of the courts of appeals provide few incentives for employers facing plant closings to negotiate for continued employment and ongoing benefits for former employees.

When an employer sells the assets of a business, the buyer has no legal obligation to hire the employees of that business. Rather, the buyer may set new terms and conditions of employment and allow the previous work force to apply for available positions on an equal footing with outside applicants. *E.g.*, *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 261 (1974) ("[N]othing in the federal labor laws 'requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer.' ") (quoting *NLRB v. Burns Int'l Security Servs.*, 406 U.S. 272, 280 n.5

NOTES *(Continued)*

his[/her] right to a subsidy where he[/she] no longer works for the plan sponsor.") (quoting *Lear Siegler Aerospace Prods. Holding Corp. v. Smiths Indus., Inc.*, No. 88-1528, 1990 U.S. Dist. LEXIS 2887, at * 15 (S.D.N.Y. March 16, 1990)). As the circuit courts in *Hunger*, *Cattin* and *Harms* recognize, the "plain language" of ERISA precludes the result in *Gillis*. Construing ERISA, this Court has similarly condemned such departures from the congressional mandate. *E.g.*, *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063, 2071 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration."); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)("This 'blue pencil' method of statutory interpretation – omitting all words not part of the clauses deemed pertinent to the task at hand – impermissibly ignores the relevant context in which statutory language subsists."). *See also Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'The short answer is that Congress did not write the statute that way.' ")(quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)).

(1972)). If the buyer does not agree to hire the employees, they are considered terminated by the seller, and they have no right to receive contingent early retirement subsidies that they have not yet earned. That is the rule in *Berger*, distinguished by the court in *Gillis*.

If the buyer hires the employees, but does not establish a defined benefit pension plan, the rule in *Gillis* will require the seller's plan to recognize future service with the buyer, so that the affected employees hired by the buyer may continue to earn service credits towards contingent early retirement subsidies in the *seller's* plan. The rulings in *Hunger* and *Cattin*, on the other hand, do *not* require the seller's plan to recognize future service with the buyer. If sellers, in deference to *Gillis*, are now required to recognize service with the buyer, at significant expense to their defined benefit pension plans (but with no concomitant productivity resulting from the expense), sellers have no incentive to ask buyers to guarantee employment for their former employees.

Additionally, the circuit court in *Gillis*, by impressing this additional burden on a defined benefit pension plan, may further the current move away from such defined benefit plans to defined contribution plans. As the name suggests, defined benefit pension plans afford participants greater certainty in their pensions than defined contribution pension plans. Typically, in defined contribution plans, *e.g.*, 401(k) plans, the participant bears the investment risk. Left standing, the Third Circuit's ruling in *Gillis* will encourage plan sponsors to drop defined benefit plans in favor of less expensive (and far more uncertain) defined contribution plans.

CONCLUSION

Based on the foregoing, cross-petitioners Hoechst Celanese Corporation and Hoechst Celanese Retirement Plan request that the Court grant this petition for certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

Filed September 7, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-1879

LEONARD GILLIS,
for themselves and all others similarly situated, as a class;

VALDO A. SARGENI,
for themselves and all others similarly situated, as a class;

v.

HOECHST CELANESE CORPORATION;
HOECHST CELANESE RETIREMENT PLAN,
a federal employee pension benefit plan and trust.
Third-Party Plaintiffs

v.

AMERICAN MIRREX CORPORATION,
a Delaware Corporation;
AMERICAN MIRREX RETIREMENT PLAN,
a federal employee benefit plan and trust,
Third-Party Defendants

Leonard Gillis and Valdo Sargeni, for themselves
and all others similarly situated,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil No. 90-05542

Argued May 17, 1993

BEFORE: STAPLETON, ALITO
and SEITZ, Circuit Judges.

Filed: September 7, 1993

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OPINION OF THE COURT

SEITZ, Circuit Judge.

Leonard Gillis and Valdo Sargeni ("plaintiffs") are former employees of the Hoechst Celanese Corporation ("Hoechst"). They allege that Hoechst and the Hoechst Celanese Retirement Plan ("Hoechst Retirement Plan") have failed to comply with certain provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. They also advance two state law claims.

The district court had jurisdiction over the ERISA claims under 29 U.S.C. § 1132 and jurisdiction over the state law claims under 28 U.S.C. § 1367(a). We have jurisdiction over plaintiffs' appeal from a final order of the district court pursuant to 28 U.S.C. § 1291.[1]

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1. We directed the parties to file briefs on the issue of whether we had jurisdiction over this appeal in light of the fact that the district court amended the order appealed from after plaintiffs filed their notice of appeal.

I. BACKGROUND

Hoechst sold its PVC Division in Delaware City, Delaware to the American Mirrex Corporation ("American Mirrex") in 1989. It is not disputed that plaintiffs, who were employed in the PVC Division, have continued to work in their same positions for their new employer, American Mirrex.

In August of 1990, plaintiffs filed the complaint in this action advancing six separate claims arising from the sale. The district court granted plaintiffs' request for certification as class representatives for their claim under ERISA that Hoechst improperly denied them severance pay and their state law claim that Hoechst improperly denied them vacation pay. The district court denied plaintiffs' request for certification as class representatives for their claims under ERISA that Hoechst and the Hoechst Retirement Plan (collectively "defendants") failed to transfer sufficient funding to the American Mirrex Retirement Plan to fund their early retirement benefits and for their claim that defendants should be penalized for reporting and disclosure violations of ERISA.[2] Each plaintiff brought one of the two remaining claims in his individual capacity.

We conclude that the September 28, 1992, order appealed from was a final judgment which disposed of all claims between the parties. Thus, plaintiffs were not required to file a second notice of appeal after the district court later amended the September 28, 1992, order to make certain corrections of a clerical nature. *See* Fed. R. Civ. P. 60(a); *Barris v. Bob's Drag Chutes & Safety Equip., Inc.*, 717 F.2d 52, 55 (3d Cir. 1983) ("[A] motion to correct a clerical mistake does not affect the finality of the original judgment nor does it toll the time limits within which an appeal must be taken." (citations omitted)) *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110, 113 (3d Cir.) (same), *cert. denied*, 484 U.S. 853 (1987).

2. The district court subsequently denied plaintiffs' motion for reconsideration of its order denying class certification on these two claims.

Plaintiff Sargeni alleged that Hoechst breached a contractual obligation to provide him with counseling concerning his benefit options at the time it sold the PVC Division. Plaintiff Gillis contended that Hoechst violated ERISA by failing to give him seniority credit for two years that he worked at a Hoechst plant in Canada.

In June of 1992, defendants filed a motion seeking summary judgment or dismissal of all claims. The district court issued a memorandum and order granting summary judgment for defendants on all claims except the vacation pay claim and the breach of contract claim which were both based on state law. It dismissed those claims for lack of subject matter jurisdiction. It also denied plaintiffs' motion for partial summary judgment. Plaintiffs then filed this timely appeal.

II. DISCUSSION

On this appeal from a grant of summary judgment, "[t]he non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." *Id.* Our review is plenary. *Id.*

We turn first to a review of that portion of the district court's order granting summary judgment for defendants.

A. Claims Disposed of By Summary Judgment

1. Severance Benefits

Simply stated, plaintiffs argue that their employment with Hoechst was "severed" when the PVC Division was sold and, therefore, they are entitled to severance pay. Hoechst's Corporate Human Resource

Department ("the Department") denied plaintiffs' request for severance pay and the district court granted summary judgment for Hoechst on this claim after concluding that the Department's denial was not arbitrary or capricious.

As a threshold matter, we must consider plaintiffs' argument that the district court erred when granting summary judgment by relying upon a document identified by Hoechst as the Hoechst Celanese Separation Pay Policy. Plaintiffs allege that this document was fabricated by Hoechst after the date on which plaintiffs requested severance pay. The authenticity of this document is important for two reasons. First, the district court relied on the document when determining the eligibility requirements for severance pay. Second, the district court also relied on this document when determining the degree of scrutiny with which it reviewed the decision by the Department to deny these benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)(holding that a court should review a plan administrator's denial of benefits under a de novo standard unless the plan grants the administrator discretion when making eligibility decisions, in which case an arbitrary and capricious standard applies).

Because plaintiffs have no direct evidence that the document was fabricated after-the-fact, they rely exclusively on circumstantial evidence. Plaintiffs first assert that the document was not distributed to the employees at the PVC Division and was not produced until after they made their claim for severance pay. Indeed, defendants concede, as they must, that "[t]here is, in the record below, an admitted failure to supply a copy of the [separation pay] plan on a timely basis to the plaintiffs." (Tr. of oral argument at 32). However, standing alone, the fact that the separation pay policy document was not distributed to the employees is "irrelevant in determining entitlement to benefits." *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir.), *cert. denied*, 111 S.Ct. 2856 (1991).

Plaintiffs also note that the document pre-dates the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and yet utilizes the "arbitrary and capricious" standard which was adopted by the *Bruch* Court. However, use of the arbitrary and capricious standard was not uncommon in the years before *Bruch* was decided. *See Bruch*, 489 U.S. at 107 (stating that, at the time *Bruch* was decided, "most federal courts [were] review[ing] the denial of benefits by ERISA fiduciaries and administrators under the arbitrary and capricious standard").

We conclude that plaintiffs' circumstantial evidence is insufficient to create a genuine issue of material fact as to the authenticity of the separation pay policy document produced by Hoechst. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 24752 (1986). Accordingly, we turn to a review of the terms of that document.

The Hoechst Celanese Separation Pay Policy contains the following provision:

> Administration and Interpretation
>
> The Corporate Human Resources Department is responsible for administering this policy, issuing procedures and local guidelines, and handling any questions of policy interpretation, as well as determining the rights of any person to benefits under this policy. The decisions of the Corporate Human Resources Department shall be binding unless arbitrary and capricious.

(J.A. at 2708).

Under this provision, the Department was given discretion to interpret the terms of the separation pay policy when making eligibility determinations. Consequently, we apply the arbitrary and capricious standard when reviewing the Department's determination to deny plaintiffs' request for benefits. *See Bruch*, 489 U.S. 101; *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) ("[T]he arbitrary and capricious

standard [applies] because the plan contains provisions which give[] the administrator discretion in making eligibility determinations.").

We have explained that when the arbitrary and capricious standard applies the decisionmaker's determination to deny benefits must be upheld unless it was "clear error" or not "rational." *Shiffler v. Equitable Life Assurance Soc'y*, 838 F.2d 78, 83 (3d Cir. 1988). To determine whether the Department's denial of plaintiffs' benefits was irrational or clearly erroneous here, we turn to an examination of the pertinent separation pay policy provisions governing eligibility.

The Hoechst Celanese Separation Pay Policy states:

> 1. *Policy*
> It is the policy of Hoechst . . . to provide separation pay to eligible employees resulting from certain types of involuntary terminations of employment. . . .
>
> 2.1 *Eligibility*
> All regular, full-time, salaried employees . . . who are involuntarily terminated from active employment due to
> . . .
> – sale of all or part of a business **(where the acquiring or purchasing company does not offer continued employment)**
> . . .
> are eligible for separation pay.
>
> 2.2 All regular, full time, salaried employees who are terminated by reason of
> . . .
> – any other reason not specified in 2.1 are ineligible for separation pay.

(J.A. at 3145) (bolding added, italics in original). In light of the parenthetical exclusion within section 2.1, it appears that Hoechst intended to deny severance pay to any employees who were offered continued employment

with the purchasing company when the division in which they worked was sold. Thus, the Department's decision to deny severance benefits to plaintiffs does not appear to have been irrational or clearly erroneous. Nevertheless, plaintiffs argue that summary judgment was unwarranted for several reasons.

First, plaintiffs argue that they are entitled to severance benefits under certain documents other than the separation pay policy document discussed above. One document plaintiffs seek to rely upon is a 1986 Agreement of Merger between the companies that combined to form Hoechst. However, even if we assumed that this merger agreement could alter or override the separation pay policy discussed earlier, it did not provide severance pay for any employees who left employment after February of 1989 – months before plaintiffs ceased working for Hoechst. (J.A. at 3439).

Plaintiffs also seek to rely upon "VALUES" brochures which Hoechst distributed to its employees.[3] However, as the district court noted, the VALUES booklets contained the following disclaimer:

> This booklet summarizes certain plan documents and contracts. If there is a difference between this booklet and the documents or contracts, then the documents and contracts will govern. . . .

(J.A. at 3393); *see Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 809 (E.D. Pa. 1992). In light of this disclaimer, we conclude that, under ERISA, these documents were, at most, summary plan descriptions. Accordingly, the plan document (i.e., the separation pay policy document) controls and the plaintiffs "cannot recover under 29 U.S.C. § 1132(a)(1)(B) [of ERISA] for

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3. Plaintiffs do not contend that these brochures contain any statements expressly referring to severance pay. Plaintiffs rely, instead, on a "promise of 'fair treatment' in managing business change." (Pls.' Br. at 36).

benefits allegedly due under a summary plan description." *Gridley*, 924 F.2d at 1318.

Finally, plaintiffs argue that Hoechst is equitably estopped from denying them severance benefits. When a plaintiff asserts an equitable estoppel claim based on an ERISA reporting and disclosure violation, the plaintiff must satisfy more than simply the "ordinary elements" of equitable estoppel. *Gridley*, 924 F.2d at 1319.[4] As we stated when rejecting a similar claim: "Our precedents indicate that an ERISA reporting or disclosure violation . . . cannot provide a basis for equitable estoppel . . . in the absence of 'extraordinary circumstances.' " *Id.* Plaintiffs, who were offered and accepted employment with American Mirrex, failed to introduce evidence that they were victims of "extraordinary circumstances." Indeed, just as in *Gridley*, "the present case does not even satisfy the ordinary elements of the doctrine of equitable estoppel" because plaintiffs failed to introduce any evidence that they relied upon their expectation of severance pay. Thus, plaintiffs have failed to introduce sufficient evidence to withstand summary judgment on this claim.

In view of the foregoing analysis, we conclude that the district court properly granted summary judgment for defendants on the plaintiffs' class action claim for severance benefits.

2. Early Retirement Benefits

Plaintiffs argue that Hoechst underfunded the American Mirrex Plan in violation of 29 U.S.C. § 1058, because Hoechst allegedly failed to transfer sufficient assets to fund plaintiffs' early retirement benefits. Hoechst counters that "ERISA does not protect or regulate these benefits for plaintiffs" and "[a]s a matter

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4. The "ordinary elements" of equitable estoppel include: "(1) a material representation, (2) reasonable reliance upon that representation, and (3) damage resulting from that representation." *Gridley* 924 F.2d at 1319.

of law, therefore, plaintiffs have no claim for underfunding or even for outright elimination of this benefit." (Defs.' Brief at 17). The district court concluded that plaintiffs' right to early retirement benefits is not protected by ERISA because neither plaintiff satisfied the eligibility requirements for early retirement at the time the PVC Division was sold.

To be eligible for early retirement benefits under the Hoechst Retirement Plan, the sum of an employees' age and years of service for the plan sponsor must be at least 85 (e.g., 55 years of age with 30 years of service). It is undisputed that neither plaintiff qualified for early retirement under this so-called "rule of 85" on the date that Hoechst sold the PVC Division to American Mirrex. Nevertheless, plaintiffs argue that ERISA protects their right to qualify for early retirement benefits under the Hoechst Retirement Plan at some point in the future. As a corollary to this argument, plaintiffs contend that defendants must credit their years of service with their new employer, American Mirrex, in determining whether they satisfy the rule of 85. Plaintiffs thus raise an important issue that has not yet been decided by this court.

We turn to a review of that portion of the district court's order which granted summary judgment for defendants on this claim for early retirement benefits. Our review begins with an examination of ERISA and an application of the pertinent sections of that statute to the undisputed material facts on which this claim is based.

ERISA was enacted, in part, "to protect . . . the interests of participants in employee benefit plans . . . ." 29U.S.C. § 1001(b). Congress was concerned that "many employees with long years of employment [were] losing anticipated retirement benefits" because of the inadequate funding of pension plans. *Id.* § 1001(a). Consequently, although ERISA does not require employers to provide pension benefits, it does mandate certain minimum standards (i.e., funding, vesting and

participation) for plans which employers voluntarily establish for their employees. *See, e.g.*, 29 U.S.C. § 1053.

Prior to 1984, ERISA did not protect early-retirement benefits. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1185 (3d Cir. 1992) ("ERISA permitted the reduction of early retirement benefits prior to July 31, 1984, but not after."). In 1984, however, Congress amended ERISA by enacting the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984). The REA amended Section 204(g) of ERISA to protect early retirement benefits under certain circumstances. Therefore, our inquiry into whether ERISA protects plaintiffs' right to early retirement benefits must begin with an examination of the language of Section 204(g). *See United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself.").

As amended, Section 204(g) states:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after

> the amendment) the preamendment conditions for the subsidy . . . .

29 U.S.C. § 1054(g).

Subsection (g)(1), sets forth a general prohibition against plan amendments which reduce accrued benefits. Subsection (g)(2) provides that, under certain circumstances, a plan amendment which reduces early retirement benefits is to be treated as an amendment prohibited by subsection (g)(1) – i.e., as a plan amendment which reduces accrued benefits. We turn to the parties' contentions on whether defendants violated this section.

Plaintiffs argue that defendants' stated position that plaintiffs are not entitled to early retirement benefits under the Hoechst Retirement Plan is tantamount to an "amendment" of the Hoechst Retirement Plan as that term is used in Section 204(g). Plaintiffs then argue that Section 204(g)(2) prohibits such amendments unless defendants give plaintiffs the opportunity "after the amendment" to satisfy "the preamendment conditions" for early retirement benefits. 29 U.S.C. § 1054(g)(2).

Plaintiffs' interpretation of Section 204(g) is entirely plausible. However, if we were to confine our inquiry strictly to the statutory language, we could not say that it was the only possible interpretation of the statute. Indeed, plaintiffs concede that the statutory language is "somewhat convoluted." (Pls.'s Brief at 25).

Defendants note that, by its terms, Section 204(g)(2) only prohibits a plan amendment which does away with early retirement benefits if there is the possibility that a participant could "satisf[y] (either before or after the amendment) the preamendment conditions for the subsidy." 29 U.S.C. § 1054(g)(2). Defendants argue that plaintiffs do not fall within the class of persons who might satisfy the preamendment conditions (e.g. years of service for the plan sponsor) because they no longer work for Hoechst. Therefore, defendants argue, an amendment of the Hoechst Retirement Plan to

eliminate plaintiffs' right to qualify for early retirement benefits is not prohibited by Section 204(g)(2).

Both plaintiffs' and defendants' arguments find some measure of support in the language of the statute. We conclude that the statutory language of Section 204(g), standing alone, fails to provides any clear answer to the issue before this court.[5] Accordingly, we turn to other sources to aid in interpreting this statutory provision.

If this case did not involve ERISA, at this point our inquiry might turn immediately to the statute's legislative history. *See, e.g., Ardestani v. INS*, 112 S.Ct. 515, 523 (1991) (resorting to legislative history is appropriate where meaning of statute is ambiguous); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1150 (1992) (Stevens, J., concurring) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."). When interpreting ERISA's provision, however, we sometimes have the benefit of yet another source. Section 204(g), like many other sections of ERISA, has a mirror-like counterpart in the Internal Revenue Code ("IRC"). *See* 26 U.S.C. § 411(d)(6).[6] Therefore, when interpreting Section

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5. Our conclusion that Section 204(g) is somewhat ambiguous is consistent with an earlier case where we sought guidance from external sources when interpreting this same statutory section. *See Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir. 1990) (quoting statute's legislative history), *cert. denied*, 111 S.Ct. 1310 (1991). Indeed, in their briefs, plaintiffs and defendants rely on external sources to support their respective constructions of Section 204(g).

6. The reason that many ERISA sections have such counterparts in the IRC is that, to encourage employers to establish pension plans, Congress provides favorable tax treatment for plans which comply with ERISA's requirements. *See Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989) ("The ERISA statute provides tax benefits to employers who [establish an ERISA qualifying pension plan], in order to encourage broad participation."). *Compare* 26 U.S.C. § 414(l) (IRC), *with* 29 U.S.C. § 1058 (ERISA).

204(g) of ERISA, in addition to the statute's legislative history, we may also look for guidance to sources which interpret its IRC counterpart—Section 411(d)(6). *See, e.g., Hoover v. Cumberland, Md. Area Teamsters Pension Fund*, 756 F.2d 977, 981 (3d Cir.) (seeking guidance in interpreting ERISA Section 204(g) from an IRS Technical Information Release interpreting its IRC counterpart), *cert. denied*, 474 U.S. 845 (1985); *see also* 29 U.S.C. § 1202(c) (mandating that "[r]egulations prescribed by the Secretary of the Treasury under section 410(a), 411 and 412 of [IRC] . . . shall also apply to [their counterparts in ERISA]"). We turn to an examination of sources interpreting Section 411(d)(6) of the IRC.

The Internal Revenue Service ("IRS") has issued a Revenue Ruling which discusses the Section 411(d)(6) requirements for an employer who terminates an early retirement plan. *See* Rev. Rul. 85-6. In Revenue Ruling 85-6, the IRS considered whether such an employer is required to "set-aside" funds to provide early retirement benefits for its employees who might meet the age and service requirements for early retirement eligibility after the date on which the plan is terminated. The IRS stated:

> A participant could, after the date of the proposed termination, satisfy the pretermination conditions necessary to receive [early retirement benefits]. Accordingly, the proposed termination eliminating this accrued retirement-type subsidy would result in the plan failing to satisfy . . . Section 411. Further, all liabilities will not be satisfied . . . if the value of this retirement-type subsidy is not provided with respect to a participant who, after the date of the proposed termination, satisfies the pretermination conditions necessary to receive such benefit. Until the liabilities for these benefits are satisfied, the employer may not recover any remaining funds as surplus resulting from actuarial error without disqualifying the plan.

Thus, the IRS takes the position that an employee can satisfy the eligibility requirements for early retirement benefits after the early retirement plan is terminated. For example, an employee could accumulate additional years of service if he continues to work for the employer after the plan is terminated. Therefore, when a plan terminates, an employer must provide funding for early retirement benefits if there is the possibility that its employees will "grow into" these benefits at a date after its early retirement plan is eliminated.

We give weight to IRS revenue rulings and do not disregard them unless they "conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable." *Geisinger Health Plan v. Commissioner*, 985 F.2d 1210, 1216 (3d Cir. 1993). Revenue Ruling 85-6 is reasonable and is entirely consistent with Section 204(g) of ERISA and Section 411(d)(6) of the IRC. It is also consistent with the legislative history of the REA.[7]

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7. Prior to the favorable vote on the REA, one of the bill's sponsors explained the legislative intent behind the section of the REA which amended Section 204(g) of ERISA as follows:

> [This section] contains an important change in current law having a far-reaching effect in eliminating currently perceived abuses occurring when overfunded pension plans are terminated and the excess assets revert to the employer . . . . [A] plan is not to be considered . . . to have satisfied all of its liabilities to participants and beneficiaries until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan, meets the requirements for a subsidized benefit. This change from present law means that for sufficient plans, depending on the circumstances, some or all of the plan assets that would otherwise revert to the employer will now have to be allocated to participant benefits. *By sharing in additional plan assets which otherwise would revert to the employer, employees nearing early retirement at plan termination who later meet the plan's early retirement conditions receive an immediate benefit . . . [of] increased retirement equity.*

Based on the statutes, the revenue ruling and the legislative history, we would conclude that if Hoechst had continued to employ plaintiffs after terminating its early retirement plan, plaintiffs would be able to qualify for early retirement benefits at a later date by meeting the plan's pretermination requirements. We conceive of no obvious reason why this same result should not obtain when the employees continue in their same jobs for a successor employer. However, defendants argue that a sale of assets where the employees no longer continue to work for the plan sponsor is materially different from a plan termination where the employees continue to work for the plan sponsor. In short, defendants argue that "[s]ince [plaintiffs] no longer work for the plan sponsor, they cannot subsequently qualify for or 'grow into,' the right to [early retirement benefits]." (Defs.' Brief at 17).

In support of their argument, defendants quote the following passage from the legislative history of Section 301 of the REA:

> [Section 301] generally protects the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended and participants who subsequently meet the preamendments requirements. The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment), has not met the preamendment requirements.

NOTES *(Continued)*

130 Cong. Rec. H 8763 (daily ed. Aug. 9, 1984) (remarks of Representative Roukema, ranking minority member of House Subcommittee on Labor Management Relations) (emphasis added). This is some evidence that Congress intended for employees to be able to qualify for early retirement even after their employer had terminated their early retirement plan.

S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984), reprinted in, 1984 U.S.C.C.A.N. 2547, 2574. Defendants argue that plaintiffs were "separated from service" on the effective date of the sale of the PVC Division and, therefore, they can never accumulate the additional years of service which they would need to qualify for early retirement benefits under the Hoechst Retirement Plan.

Initially, we note that the "separated from service" language does not expressly appear in Section 204(g) of ERISA, nor does it appear in Section 411(d)(6) of the IRC. However, in interpreting neighboring sections of the IRC, the IRS has consistently taken the position that

> an employee will be considered separated from service . . . only upon the employee's death, retirement, resignation, or discharge, and not when the employee continues in the same job for a different employer as a result of liquidation, merger, consolidation, etc. of the former employer.

Rev. Rul. 79-336 (interpreting "separated from service" under IRC section 402); *see* Rev. Rul. 80-129 (same); Priv. Ltr. Rul. 86-14-048 (Jan. 9, 1986) ("[W]henever an employee follows the transfer of assets of a business to a new employer, no matter what the form takes, there is no separation from service unless the employee either immediately takes on new responsibilities at the new employer or actually separates from service by going to work for an unrelated business."); Gen. Couns. Mem. 39,384 (Jul. 18, 1985) (concluding that "separation from service" under IRC section 409 should be interpreted in the same way as that phrase is interpreted under IRC section 402).

At least one court has relied upon these IRS sources in concluding that employees who continue to work in their same jobs for a successor employer do not undergo a separation from service for the purpose of eligibility for early retirement benefits. *See Hollingshead v. Burford Equip. Co.*, 809 F.Supp. 906, 917-18 (M.D. Ala. 1992).

The relevant facts in *Hollingshead* are virtually identical to the facts before this court. The first employer sold certain assets, including a manufacturing facility, to a successor employer. The plaintiffs in *Hollingshead* continued to work in their same positions for the successor employer. *Id.* at 916. They argued that, under Section 204(g) of ERISA, they should be able to become eligible for early retirement under the first employer's plan "even though they did not qualify for early retirement at the time the sale of assets occurred." *Id.*

Just as in this case, the first employer in *Hollingshead* argued that its liability ended with the asset sale and that it had no liability to anyone who had not met the requirements for early retirement at the time of the sale. *Id.* However, the *Hollingshead* court concluded that the plaintiffs had not undergone a separation from service with the first employer. *Id.* at 917-18. Rather, it concluded that "employees [of the first employer] who continue to work for [the successor employer] in the same job are allowed to 'grow into' their early retirement pension benefit while working for [the successor employer]." *Id.* at 918.

We agree with the reasoning of the *Hollingshead* court that an employee is not separated from service if the employee continues on in the same job for a successor employer. There is no dispute that plaintiffs continued in their same jobs for American Mirrex. Thus, we conclude that plaintiffs were not separated from service and they can continue to accumulate years of service while working for America Mirrex – the successor employer. Our conclusion is supported by the statutes, the IRS rulings and the legislative history of the REA. Our conclusion is also consistent with the IRS regulations that implement Section 411(d)(6). *See* 26 C.F.R. 1.411(d)-4 (Q&A 3)(1992) ("Section 411(d)(6) protected benefits may not be eliminated by reason of transfer or any transaction amending or having the effect of amending a plan or plans to transfer benefits.").

In addition, our conclusion is consonant with the position taken by the IRS in at least one private letter ruling. *See* Priv. Let. Rul. 91-420-27 (Oct. 18, 1991) (rejecting argument that if "[n]one of the employees . . . had 30 years of benefit service" then, "[i]n calculating the amount to be transferred . . . the fully subsidized early retirement benefit after 30 years of benefit service does not have to be considered, because the employees . . . will not be able to earn any further years of benefit service [after going to work for the successor employer]").

We rejected defendants' argument that our conclusion conflicts with two of this court's earlier decisions. *See Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988). *Berger* is easily distinguishable because all of the plaintiffs in that case had left their employment before meeting the requirements for early retirement. 911 F.3d at 915. Accordingly, there was a separation from service and no possibility that the employees would later meet the eligibility requirements for early requirement benefits. *Hlinka* is also distinguishable because that decision did not involve the application of Section 204(g) of ERISA, 863 F.2d at 284 n.10.

We also recognize that two district courts interpreting Section 204(g) have reached a contrary conclusion. *See Berard v. Royal Elec., Inc.*, 795 F. Supp. 519 (D.R.I. 1992); *Lear Siegler Aerospace Prods. Holding Corp. v. Smiths Indus., Inc.*, No. 88 Civ. 1528, 1990 WL 422417 (S.D.N.Y. 1990).[8] However, we find the reasoning em ployed by those courts unpersuasive. The *Lear Siegler*

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8. Although two courts of appeals have also considered this issue after the enactment of Section 204(g), their opinions do not address the application of that section. *See Fuller v. FMC Corp.*, Nos. 92-1738 & 92-2248, 1993 WL 280762, at *6 (4th Cir. July 28, 1993); *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 932 (10th Cir. 1992).

court quoted the same "separation from service" language that we discuss above. 1990 WL 422417, at *12. However, it then implicitly concluded that an employee is separated from service when the facility where the employee works is sold to a new employer and the employee no longer works for the plan sponsor. *Id.* at *12-14. The *Berard* court adopted the reasoning of the *Lear Siegler* court with little analysis of its own. As discussed above, we reject that reasoning.

We realize that, under ERISA, defendants can transfer their liability for early retirement benefits to the American Mirrex Retirement Plan. *See* 29 U.S.C. § 1058. However, to transfer their liability for early retirement benefits, defendants must transfer sufficient assets to the American Mirrex Retirement Plan to fund those benefits. *See* 29 U.S.C. § 1344(a)(6). We note that defendants contend that "the amount of funds transferred [to the American Mirrex Retirement Plan] was calculated to include the liability related to the 'Rule of 85' early retirement benefit." (Defs.' Brief at 14). However, as the district court correctly noted, whether defendants transferred sufficient assets to the American Mirrex Retirement Plan to fund the early retirement benefits is a disputed factual issue. *See Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 810 (E.D. Pa. 1992). The consequence of the resolution of this disputed factual issue is a matter for the district court in the first instance.

In sum, we conclude that plaintiffs were not separated from service and, thus, they can continue to accumulate years of service while working for American Mirrex — the successor employer — to be counted towards qualifying for early retirement benefits. Accordingly, we will vacate that portion of the district court's order which granted summary judgment for defendants on this claim.

The district court refused to certify plaintiffs as class representatives on this claim based largely on its interpretation of Section 204(g) of ERISA. Because we have

rejected that interpretation, we will also vacate the district court's order to the extent that it denies class certification and will remand that issue for reconsideration.

3. Reporting and Disclosure Violations

Plaintiffs allege that defendants failed to comply with ERISA's reporting and disclosure requirements with respect to the Hoechst Retirement Plan and the Hoechst Celanese Separation Pay Policy. Plaintiffs sought an injunction ordering defendants to comply with these requirements and they also asked the district court to impose civil penalties against defendants. The district court assumed, without deciding, that defendants violated the reporting and disclosure requirements, but declined to grant the requested relief because it concluded that plaintiffs had not been harmed by any such nondisclosure. We turn to a review of the district court's conclusion.

Under ERISA, "[t]he [plan] administrator shall, upon written request of any participant or beneficiary, furnish a copy of [certain plan documents]." 29 U.S.C. § 1024(b)(4). We see no statutory support for the district court's apparent conclusion that a plan participant must demonstrate harm in order to obtain an injunction requiring the plan administrator to comply with this disclosure provision. Our conclusion that harm need not be shown is supported by the Supreme Court's statement that "Congress' purpose in enacting the ERISA disclosure provisions [was to] ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (quoting H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 11 (1973)). Thus, we conclude that ERISA does not require that harm be shown before a plan participant is entitled to an injunction ordering the plan administrator to comply with ERISA's reporting and disclosure requirements. To the

extent that the district court may have believed otherwise we conclude that it erred. Accordingly, we cannot affirm the district court's grant of summary judgment on the reporting and disclosure claim on this basis.

As we stated earlier, the district court assumed, without deciding, that plaintiffs had standing to bring this claim and that defendants were guilty of reporting and disclosure violations. If, on remand, the district court decides these issues in plaintiffs' favor, it should then issue an injunction requiring the plan administrator to comply with ERISA's reporting and disclosure requirements. Whether the district court awards plaintiffs any monetary damages is a matter of discretion. *See* 29 U.S.C. § 1132(c)(1). We flatly reject plaintiffs' argument that "[t]he $100-per-day penalty of 29 U.S.C. § 1132(c)(1) must be imposed for failure to produce documents on request." Pls.' Brief at 45) (emphasis added).

The district court also denied plaintiffs' request for class certification on this claim. However, at the time it denied the request for class certification, the court may have assumed that plaintiffs had no claim to benefits under the Hoechst Retirement Plan. Because, in light of our holding on the early retirement claim, such an assumption may be incorrect we will also vacate the portion of the district court's order which denied class certification and remand that issue for reconsideration.

4. Seniority Claim

Plaintiff Gillis contended that, under ERISA, his seniority should be adjusted to include his two years of service at a plant in Canada owned by Hoechst. We think that in granting summary judgment for Hoechst the district court necessarily denied this claim.[9] How-

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9. In its order entered on September 28, 1992, the district court stated: "The motion for summary judgment of defendants . . . is granted." We conclude that this grant of summary judgment included the denial of this claim. *See supra* note 1.

ever, the district court's opinion did not explain the basis for its decision in this regard. Thus, "the reason for summary judgment is [not] apparent on the record." *Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 258 (3d Cir. 1990). We are unable to determine whether the district court denied this claim because it concluded that it was waived or whether it denied the claim for reasons related to its merits. Accordingly, we lack "a reasoned basis on which to found our review." *Id.* In this case, our difficulty in reviewing the district court's decision was not alleviated by the briefing and oral argument on this appeal. *Cf. id.* at 259. Therefore, we will vacate the district court's order to the extent that it denies this claim and remand the claim so that the basis for the decision can be explicated by the district court and an appropriate order can be entered.

B. Claims Disposed of By Dismissal

The district court certified plaintiffs as class representatives for their state law vacation pay claim. However, the district court subsequently dismissed the vacation claim after reasoning: "[B]ecause there is no longer a viable federal claim, there is no longer subject matter jurisdiction, and I must dismiss this matter." *Gillis v. Hoechst Celanese Corp.*, 818 F.Supp. 806, 811 (E.D. Pa. 1992). The district court applied this same reasoning when it dismissed Plaintiff Sargeni's state law claim that Hoechst breached a contractual obligation to provide him with counseling concerning his benefit options at the time it sold the PVC Division.

We express no opinion on whether the district court was correct in its legal analysis on this issue. Because we have reversed the district court's order to the extent that it grants summary judgment on the early retirement claim, the reporting and disclosure claim and the seniority claim, there are now viable federal claims. Accordingly, we will reverse the district court's order to the extent that it dismisses these two claims on that ground.

III. CONCLUSION

The order of the district court will be vacated to the extent that it grants summary judgment for defendants on the early retirement benefits funding claim and the reporting and disclosure claim and to the extent that it denies class certification on those claims. The order of the district court will also be vacated to the extent that it grants summary judgment for Hoechst on the seniority claim. In addition, the order of the district court will also be vacated to the extent that it dismisses the vacation pay claim and the breach of contract claim based on lack of subject matter jurisdiction. The remainder of the district court's order will be affirmed.

ALITO, Circuit Judge, concurring:

I join the opinion of the court, but I write separately to highlight my understanding of the question concerning early retirement benefits that is before us and the reasons why the district court's decision with respect to this question was incorrect.

The plaintiffs acknowledge that their current employer's retirement plan (the American Mirrex Retirement Plan) states that they are to receive the same early retirement benefits subject to the same conditions as their previous plan (the Hoechst Celanese Retirement Plan). The plaintiffs argue, however, that Hoechst Celanese, in violation of Section 208 of ERISA, 29 U.S.C. § 1058, and Section 414(1) of the Internal Revenue Code, 28 U.S.C. 414(l), failed, upon selling the division in which they worked, to transfer to the American Mirrex Plan sufficient assets to fund their early retirement benefits.

Section 208 of ERISA, 29 U.S.C. § 1058, states in pertinent part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is

> equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had been terminated).

In a similar vein, Section 414(l) of the Internal Revenue Code, 26 U.S.C § 414(l), provides that a plan is not "qualified" unless the same requirements are met. Thus, both provisions require us to compare (a) the benefits, if any, that the plaintiffs would have received if the Hoechst Celanese Plan had terminated just before the transfer of assets with (b) the benefits, if any, that the plaintiffs would have received if the American Mirrex Plan had terminated just after the transfer.

In order to determine the benefits that the plaintiffs would have received upon termination of the plans at these two points in time, it is necessary to look to Section 4044 of ERISA, 29 U.S.C. § 1344, which prescribes the order in which the assets of a single-employer defined benefit plan are allocated among participants and beneficiaries at termination. The effect of all of these provisions – 26 U.S.C. § 414(l) and 29 U.S.C. §§ 1058 and 1344 – when read together was to require that any allocation of assets to the plaintiffs' early retirement benefits that would have occurred upon termination of the Hoechst Celanese Plan just before the transfer not exceed the allocation of assets to those benefits that would have occurred upon termination of the American Mirrex Plan just after the transfer.

In order to determine what allocation, if any, would have been made to the plaintiffs' early retirement benefits if the Hoechst Celanese Plan had terminated prior to the transfer of assets, we must consider Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and its counterpart, Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6). Section 204(g) of ERISA prohibits any plan amendment that reduces the early retirement benefits of a participant who "satisfies (either before or after the amendment) the preamendment conditions for

the subsidy." 29 U.S.C. § 1054(g)(2). Likewise, Section 411(d)(6) of the Internal Revenue Code states that a "qualified" plan must treat a participant's early retirement benefits in the same manner. As previously noted, Section 208 of ERISA and Section 414(l) of the Internal Revenue Code require us to hypothesize that the Hoechst Celanese Plan terminated just prior to the transfer of assets to the American Mirrex Plan. Consequently, if this hypothetical termination of the Hoechst Celanese Plan would have constituted an "amendment" Section 204(g) of ERISA and Section 411(d)(6) of the Internal Revenue Code would have required that the plaintiffs be given the opportunity to "satisf[y] (either before or after the [termination]) the pre[termination] conditions for the subsidy."

While neither Section 204(g) of ERISA nor Section 414(l) of the Internal Revenue Code expressly states that a termination must be regarded as an amendment for these purposes, Revenue Rule 85-6 has drawn this conclusion. This ruling concerned the proposed termination of an overfunded defined benefit plan that provided for excess assets (i.e., the value of the plan's assets less the present value of the participants' benefits on a termination basis) to revert to the employer as permitted by Section 4044(b) of ERISA, 29 U.S.C. § 1344(b). The ruling concluded that, upon termination of the plan, those employees who had not yet satisfied the age and years-of-service requirements for early retirement benefits could not be deprived of the right to satisfy those conditions after the date of termination. The ruling further reasoned that those prospective benefits had to be funded by some means before any residual assets could revert to the employer.

For the reason stated in the opinion of the court, I believe that Rev. Rul. 85-6 should be heeded. It follows that, if the Hoechst Celanese Plan had terminated just before the transfer, the plaintiffs would have retained the right to qualify for early retirement benefits after the termination and that assets would have had to have been

allocated to these prospective benefits. Consequently, in order to comply with Section 208 of ERISA and Section 414(l) of the Internal Revenue Code, Hoechst Celanese was required to transfer sufficient assets to the American Mirrex Plan to ensure that at least an equal allocation would occur if the latter plan terminated just after the transfer. Since there is a factual dispute as to whether the defendants in this case transferred sufficient assets to meet this requirement, summary judgment for the defendants was inappropriate.

STAPLETON, J., Concurring and Dissenting:

As the court's opinion recognizes, under § 1058 of ERISA, defendants can transfer their liability for early retirement benefits to the American Mirrex Retirement Plan and they have purported to do so. The only issue separating the parties is whether defendants have transferred sufficient assets to that plan to satisfy § 1058. Unlike my colleagues, I conclude that they have.

Section 1058 provides that a plan "may not . . . transfer its assets or liabilities to any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the . . . transfer which is equal to or greater than the benefit he would be entitled to receive immediately before the . . . transfer (if the plan had then terminated)." Thus the key to understanding the requirements of § 1058 is to focus first on what benefit the participants would receive if the plan were terminated immediately prior to the transfer. That benefit, and the funding required to pay the present value of the total of all such benefits, establishes the floor of permissibility for the transfer. If each participant would receive no lesser benefit on a termination immediately after the transfer, and the funding is available immediately after to pay an amount equal to the present value of the total of all such benefits, § 1058 is satisfied and the transfer is permissible. See 26 C.F.R. § 1.414(1)-1(e)(i).

In order to determine whether a plan participant who had not yet qualified for an early retirement benefit through giving the stipulated years of service to the employer would be entitled to receive something attributable to that benefit upon a termination immediately prior to the transfer, we must look to § 1344, the section that specifies the benefits which must be provided for on a termination. The cases decided prior to the Retirement Equity Act clearly hold that an early retirement benefit is not an accrued benefit and that nothing need be provided on a termination with respect to someone who has not served the employer long enough to earn the early retirement benefit. *E.g.*, *Ashenbaugh v. Crucible, Inc.*, 854 F.2d 1516, 1526 (3d Cir. 1988) (defining "accrued benefit" to exclude an early retirement benefit). The issue remains, however, whether the REA reversed this holding. I conclude that it did not.

Section 1054(g) provides in relevant part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

It is my understanding that the early retirement benefit here at issue is retirement type subsidy and,

accordingly, that it is an accrued benefit that cannot be reduced if the relevant participant can meet the conditions for the subsidy before or after an amendment. When § 1054(g) and § 1344 are read together, one finds that where a participant has qualified for an early retirement benefit prior to a termination or may thereafter qualify for that benefit by aging and giving additional service to the plan sponsor, the present value of the benefit has to be paid or set aside on termination. On the other hand, where, at the time of termination, a participant has not qualified for such a benefit and will not be able to do so in the future because the opportunity to give service to the plan sponsor will not exist, nothing need be paid or set aside on termination with respect to the early retirement benefit. Thus, if a plan sponsor terminates a plan in the course of a liquidation of its business in bankruptcy, for example, it need pay nothing to a participant who has not given the sponsor sufficient service to qualify for an early retirement benefit. As I understand the plaintiffs to concede, this is the effect of our decision in *Berger v. Edgewater Steel Corp.*, 911 F.2d 911 (3d Cir. 1990).

The case before us is not materially different from the above liquidation hypothetical. Instead of liquidating and terminating its plan in connection with selling all of its assets to a third party or parties, Hoechst, in the hypothetical posed by § 1058, is terminating a portion of its plan in connection with selling the assets of one of its businesses to a third party. The employees with respect to whom the plan is being terminated are going to work for the third party and will never render the service to Hoechst that it bargained for when it created the early retirement benefit. As a result, no early retirement benefit would be payable to the plaintiffs upon a termination immediately prior to the transfer, and it is insufficient to fund early retirement benefits for plaintiffs under the Hoechst plan.

As the court's opinion acknowledges, the *Royal Electric* and *Lear Siegler* cases concur in my analysis. I

acknowledge that the *Hollingshead* case does not. In the final analysis, I differ from my colleagues and the *Hollingshead* court because I find no help in Rev. Rul. 79-336 and Rev. Rul. 80-129 when it comes to determining whether, for purposes of § 1054(g)(2), a participant who has not, and will not in the future, give sufficient years of service to the plan sponsor to qualify for an early retirement benefit is a "participant who satisfies the conditions" of that benefit. Section 1054(g)(2) does not use the phrase "at the time of separation from service" and the referenced Revenue Rulings have nothing to do with the subject matter of § 1054(g)(2) or its companion section of the IRC, 411.[1] Sections 1054, 1058 and 1344 do, for me, clearly dictate that, in the context of termination, an early retirement benefit of the kind here involved is not accrued and need not be provided for with respect to any participant who will never be able to satisfy a minimum service to the sponsor requirement.

I agreed with and join the opinion of the court in all other respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

1. My understanding of the application of 1054, 1058 and 1344 in circumstances of this kind is, of course, consistent with Rev. Rul. 85-6 which does construe § 411.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEONARD GILLIS and VALDO A. SARGENI, on behalf of themselves and all others similarly situated	:	CIVIL ACTION NO. 90-5542
v.	:	
HOECHST CELANESE CORPORATION and HOECHST CELANESE RETIREMENT PLAN	:	

MEMORANDUM AND ORDER

DITTER, J. September 24, 1992

In this case, employees claim they lost benefits when the plant where they worked was sold to another company. Plaintiffs, Leonard Gillis and Valdo A. Sargeni, are asserting claims against Hoechst-Celanese Corporation and the Hoechst Celanese Retirement Plan under the Employee Retirement Income Security Act, 9 U.S.C. §§ 1001-1371, and the Delaware Wage Payment and Collection Act, Del. Code Ann. tit. 19, §§ 1101-1115. The parties submitted cross motions for summary judgment. Also pending is the plaintiffs' motion for reconsideration of my March 31, 1992, decision concerning an early retirement issue.

Having considered the briefs, I will grant the defendants' motion for summary judgment, deny the plaintiffs' motion for summary judgment, deny the motion for reconsideration, and order judgment in favor of the defendants and against the plaintiffs.

On February 27, 1987, the American Hoechst Corporation merged with the Celanese Corporation. In May, 1989, HoechstCelanese sold its Delaware City PVC division to the American Mirrex Corporation. Mr. Gillis

and Mr. Sargeni were originally salaried employees of American Hoechst, became Hoechst-Celanese salaried employees because of the merger, and then became American Mirrex salaried employees when that company bought the PVC division.

Despite the sale, Mr. Gillis, Mr. Sargeni, and the other PVC division employees continued to work at the Delaware City facility, albeit for the new employer. They kept the same jobs and did not lose any working days.

In connection with its purchase of the PVC division, American Mirrex agreed to provide substantially the same employee benefits as those of Hoechst-Celanese. Mr. Gillis and Mr. Sargeni claim, however, that they have lost severance pay, certain early retirement benefits, and vacation pay. Mr. Gillis and Mr. Sargeni seek a declaration that they deserve these benefits, appropriate funding for them, and penalties for various reporting and disclosure violations under ERISA.

In an order dated March 31, 1992, I certified Mr. Gillis and Mr. Sargeni as class representatives for the severance and vacation pay claims. In these matters, Mr. Gillis and Mr. Sargeni represent themselves and other former Hoechst-Celanese employees who now work for American Mirrex in the Delaware City PVC Division. On the final two issues, the reporting violations and early retirement claims, Mr. Gillis and Mr. Sargeni are proceeding for themselves only.

To prevail on summary judgment, a party must show there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, even after all of the evidence is interpreted in a way most favorable to the other party. To show there are no genuine issues, a party must show that no reasonable fact-finder, after considering all of the evidence presented, could find for the other party.

I. THE SEVERANCE CLAIM

Mr. Gillis, Mr. Sargeni and the class members claim they deserve severance benefits because their employment with Hoechst-Celanese ceased after the PVC plant sale. Hoechst-Celanese agrees it no longer employs the plaintiffs, but it maintains they are not entitled to severance benefits. Hoechst-Celanese claims the plain language in the company's severance plan does not provide severance payments to employees when a company acquires their division and continues to employ them. On this basis, the Hoechst-Celanese human resources department denied the plaintiffs' request for severance benefits.

The Hoechst-Celanese severance plan applied to Mr. Gillis, Mr. Sargeni and the other class members when HoechstCelanese sold the Delaware City PVC plant to American Mirrex. The plan explicitly gave the human resources department the right to interpret the plan and set up a standard of review for these decisions. Section 6 reads:

> The Corporate Human Resources Department is responsible for administering this policy, issuing procedures and local guidelines, and handling any questions of policy interpretation, as well as determining the rights of any person to benefits under this policy. The decisions of the Corporate Human Resources Department shall be binding unless arbitrary or capricious.

For this reason, I must accept the human resources department's denial of severance benefits unless it was arbitrary or capricious. *See Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990). The appropriate question is therefore whether the evidence shows the denial was clear error or not rational. *See Shiffler v. Equitable Life Assur. Soc.*, 838 F.2d 78, 83 (3d Cir. 1988). In this case, Hoechst-Celanese's severance decision must stand.

A. *The Severance Plan*

After the merger, on January 1, 1989, Hoechst-Celanese adopted a severance policy. Paragraph 2.2 of Hoechst-Celanese's "Separation Pay Policy for Salaried Employees" provides:

> All regular, full-time salaried employees who are terminated by reason of
>
> – death
> – disability
> – retirement
> – gross misconduct
> – *sale of all or part of a business (where the acquiring or purchasing company offers continuing employment)*
> – failure to return to work following furlough or leave of absence
> – any other reason not specified in 2.1
>
> are *ineligible* for separation pay (emphasis added).

On July 19, 1991, Mr. Sargeni testified that Hoechst-Celanese had distributed copies of the severance plans and updates to each employee over the years. He also said the human relations department made the documents available to interested employees and employees who needed access to them.

In addition, when it sold the PVC division to American Mirrex, Hoechst-Celanese held a series of meetings to inform its employees about the transaction. Hoechst-Celanese distributed a transcript of these meetings to Mr. Sargeni, Mr. Gillis, and the other employees on January 20, 1989, and also posted copies on company bulletin boards. One question directly addressed the severance issue, and the company representative's answer was consistent with the Hoechst-Celanese severance policy.

> Will there be a severance package if the new owner does not want to take me over?

> Yes. If you are *not* taken over at the time of the purchase and if we do not have a job for you within [Hoechst-Celanese], you will receive a severance package.

Furthermore, Mr. Gillis testified he received a copy of the severance plan from the benefits director at the PVC plant after the sale.

Under the circumstances, the uncontested evidence shows the class members were not entitled to severance pay. The plan's written severance provisions were clear, and Hoechst-Celanese communicated them to the employees both formally and informally. Since American Mirrex continued the PVC workers' employment without interruption, the plan did not provide severance benefits. Hoechst-Celanese's human resources department acted in accordance with the relevant provisions and, therefore I must uphold its decision.[1]

B. *The Plaintiffs Respond*

Mr. Gillis and Mr. Sargeni present a number of documents and situations to argue Hoechst Celanese has provided severance to employees in similar circumstances and is therefore obligated to provide severance benefits here. None of these instances or materials shows a truly similar circumstance, though, and accordingly, none forestalls summary judgment.

First, Mr. Gillis and Mr. Sargeni point to the Hoechst-Celanese VALUES program. They claim the VALUES program was the company's attempt to communicate its benefits policy to its employees and, in conjunction with certain brochures, constituted a benefits plan which

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1. In fact, the only other plan that conceivably could apply to the Hoechst-Celanese PVC division employees, the American Hoechst severance plan, would not have provided severance either. The American Hoechst plan covered the PVC employees before the merger, but it also did not provide severance to "employees who are terminated by reason of sale of all or part of a business where the acquiring or purchasing company offers continued employment."

would grant severance pay here. A brief look at the program and the brochures demonstrates why Mr. Gillis and Mr. Sargeni cannot prevail on this point.

Hoechst-Celanese instituted the VALUES program in February, 1988, to articulate a series of guiding principles for the newly formed company's operations. The *Hoechst-Celanese Update* for that month contained a speech from a Hoechst-Celanese board member that described the program this way:

> [The institution of the Values program] is our chance to create the fundamental Values of our new company, to buy into them, and, most important, to begin implementing them throughout the corporation. We have the opportunity to establish a clear vision of the future of Hoechst-Celanese.
>
> Over the next few days, we will establish Values that everyone in the corporation can identify with; Values that will provide a basis for a true merger of American Hoechst and Celanese into a true entity; Values that will lay the foundation for Hoechst Celanese leadership – in the workplace, in the market place, and on the bottom line.

Recently, the Third Circuit held a company did not amend its ERISA benefits schedule, or "summary plan,"[2] by distributing a brochure which presented an overview of company benefits. *See Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1990). The court reasoned the brochures explicitly mentioned the actual summary plan, did not contain information that Section 1022(b) of ERISA requires in a summary plan, and were perfunctory compared to the summary plan documents.

Gridley applies here.

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2. "Summary plan" is ERISA's term for a description of employee benefits. ERISA provides specific instructions about what information must appear in a summary plan.

At the outset, many of the brochures the plaintiffs identify as constituting a summary plan explicitly say: "This booklet summarizes certain plan documents. If there is a difference between the booklet and the documents, the documents will govern." In *Gridley*, a similar phrase led the court to conclude: "In light of this language, the drafter or drafters could not have thought, and a reasonable reader could not have concluded, that the new overview brochure itself was a summary plan description." *Id.* at 1316.

In addition, like the *Gridley* documents, the Hoechst-Celanese brochures and VALUES documents were brief and unspecific compared to the plan documents the plaintiffs already had. The VALUES materials also did not contain information required under section 1022(b).

More fundamentally, though, as the board member's speech and other materials in the *Hoechst-Celanese Update* made patently clear, Hoechst-Celanese began the VALUES program to set out the company's general guiding principles. In *Gridley* general brochures that addressed specific benefits were not a summary plan. By the same logic, the VALUES documents (even in conjunction with the brochures) cannot be a summary plan, and could not create an obligation to provide severance benefits.

Second, Mr. Gillis and Mr. Sargeni point to the February 20, 1987, amendment to the merger agreement between American Hoechst and Celanese Corp. They claim this document entitles them to severance payments, but the unambiguous language reads otherwise. In a provision similar to the Hoechst-Celanese severance policy, the merger agreement precludes severance payments when there is a "sale of all or part of a business, whether at one or more plant locations, where the acquiring company offers the affected employees continued employment and those employees accept such continued employment." In addition, even if it did provide for a severance payment, the merger agreement

expired on February 27, 1989, about seven months before Hoechst-Celanese sold the PVC division to American Mirrex.

Third, Mr. Gillis and Mr. Sargeni claim American Hoechst provided severance benefits to employees at its Spartenburg and Greer, South Carolina facilities and, therefore, must provide comparable benefits here. The uncontested testimony[3] reveals, however, that American Hoechst did not sell the Spartenburg plant. American Hoechst laid off the Spartenburg workers as part of a reduction in force. The Greer facility was sold, but it was a Celanese plant and the sale occurred in 1978 or 1979, approximately ten years before the Hoechst-Celanese merger. As a result, the severance benefits delivered to the Greer employees would not affect the plaintiffs, who were never Celanese employees.

Fourth, Mr. Gillis and Mr. Sargeni identify a letter distributed in conjunction with the merger of Hoechst Canada and Celanese Canada. Aside from the fact that this letter addressed Canadian workers and companies, it provides severance benefits only to employees who "may be terminated." In this way, the letter does not conflict with the Hoechst-Celanese severance policy and cannot change it. Fifth, the plaintiffs rely on a Hoechst-Celanese filing with the SEC, but that document only discussed severance pay for terminated Celanese employees. The plaintiffs were not terminated and were never Celanese employees.

Finally, Mr. Gillis and Mr. Sargeni identify two employees who received severance benefits before leaving and without having a job. Again, though, because these workers were not continuing with the acquiring company, they would not be barred from severance under the Hoechst-Celanese policy.

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3. This testimony includes admissions by both of the plaintiffs, Ronald K. Silversten (Vice President and Associate General Counsel of Hoechst-Celanese), and Richard A. Carroll (Director of Corporate Benefits for Celanese).

C. *Equitable Estoppel*

Just as they cannot show Hoechst-Celanese created a de facto amendment to the plan, the plaintiffs also cannot prevail on any kind of equitable estoppel claim. First, *Gridley* would require them to show they were victims of "extraordinary circumstances." *See Gridley*, 924 F.2d at 1319. In this case, where all of the plaintiffs kept their jobs and never lost a day of work, it would be impossible to conclude they experienced "extraordinary circumstances" by not receiving severance pay.

Moreover, the plaintiffs' testimony clearly shows they could not satisfy the reliance element of an equitable estoppel claim. Both plaintiffs admitted that, from the time they knew about the sale to the time of the sale, they never figured out what their severance benefits would be and did not spend any money or change their positions in anticipation of receiving the payments.

D. *The Severance Claim Must Fail*

Because the clear terms of the Hoechst-Celanese severance plan do not provide severance benefits to Mr. Gillis, Mr. Sargeni or the other class members, the decision to deny their severance claim could not have been arbitrary or capricious. In addition, Mr. Gillis and Mr. Sargeni have not identified documents or behavior that could demonstrate a de facto change in Hoechst-Celanese's severance benefits policy. Moreover, Mr. Gillis, Mr. Sargeni, and the other class members could not prevail on an equitable estoppel claim. For these reasons, I must enter summary judgment in favor of the defendants on the plaintiffs' severance benefits claim.

II. THE EARLY RETIREMENT BENEFITS

Under the Hoechst-Celanese Retirement Plan, employees whose age and years of service with the company added to 85 were eligible for early retirement with full benefits. This program was commonly referred to as the Rule of 85 program. Mr. Gillis and Mr. Sargeni claim

Hoechst-Celanese failed to fund the Rule of 85 program when it sold the PVC Division to American Mirrex. On this claim, the men represent only themselves.[4]

Both sides now agree American Mirrex has preserved the Rule of 85 benefit for any former PVC division employees of Hoechst-Celanese. The American Mirrex plan provides:

> If you are a Transferred Employee and are entitled to early retirement benefits, the amount of your pension will not be less than would be determined under the early retirement provisions of the Hoechst Celanese Retirement Plan as in effect on the day before the effective date of the current plan.

As a result of this agreement, Mr. Gillis and Mr. Sargeni argue the issue in this claim is now whether Hoechst-Celanese actually transferred enough money to fund their Rule of 85 benefits fully. This factual issue is clearly disputed, but it does not affect the outcome of the case.[5]

In my March 31, 1992, order, I discussed how *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1990), barred this claim. I noted that section 204(g)(1) of ERISA only prohibits employers from reducing employees' accrued benefits, and that under *Berger*, early retirement programs like the Rule of 85 were not accrued benefits. I, therefore, held Hoechst-Celanese did not violate ERISA by reducing or eliminating the Rule of 85 program for any employee who had not already satisfied the program's age and service requirements.

For this reason, even if Hoechst-Celanese did not transfer enough money to fund the Rule of 85 program for Mr. Gillis and Mr. Sargeni, the men have no recourse

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4. Mr. Gillis and Mr. Sargeni have conceded on their claim for the $300/month early retirement supplement.

5. This is the same argument the plaintiffs made in their motion for reconsideration of my March 31, 1992 order. I will deny that for the reasons that follow.

because they have no right to the Rule of 85 benefit. I must grant summary judgment in favor of the defendants on this claim.

III. THE REPORTING AND DISCLOSURE VIOLATIONS

Mr. Gillis and Mr. Sargeni also claim Hoechst-Celanese failed to satisfy ERISA's reporting and disclosure requirements. They seek an injunction ordering the defendants to produce various materials, and they seek relief under 29 U.S.C. 1132(c). Section 1132(c) provides:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required . . . to furnish to a participant . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal.

Assuming the defendants have withheld information and that Mr. Gillis, Mr. Sargeni, and the class have standing to bring this claim, the undisputed testimony shows they suffered no harm. *See First Atlantic Leasing Corp. v. Tracey*, 738 F. Supp. 863, 876 (D.N.J. 1990).

Mr. Sargeni described how the Hoechst-Celanese human resources department regularly provided documents containing benefits information and was willing to provide duplicates. Mr. Gillis and Mr. Sargeni also both testified they and the class members did not read the materials very carefully. In fact, they admitted most employees did not read them at all unless they were reviewing them for a particular purpose. Additionally, both plaintiffs' testimony indicates they and the other class members relied heavily on the company's oral presentations at meetings which were admittedly thorough and well attended. The plaintiffs have also testified

the human resources personnel were generally forthright and accessible with regard to benefits issues. Finally, the plaintiffs have not shown they lost any benefits.

Under these circumstances, where the plaintiffs did not seek benefits materials, did not carefully read the regular distributions they received, relied heavily on the company to communicate benefits information through meetings and other verbal presentations, and most importantly, have not shown Hoechst-Celanese improperly denied them any benefits under ERISA, they have suffered no harm and there can be no reason to award relief under section 1132(c). I must grant summary judgment on this claim.

IV. THE DELAWARE WAGE CLAIMS

Because I must grant summary judgment on each of the federal claims, there is no longer subject matter jurisdiction to consider the plaintiffs' state law claims.

V. CONCLUSION

Mr. Gillis, Mr. Sargeni, and the class members are not entitled to severance benefits under the Hoechst-Celanese severance plan's clear provisions. They have also failed to show Hoechst-Celanese created a de facto amendment to the severance plan, or that they could prevail on a theory of equitable estoppel. For these reasons, I must enter summary judgment on the severance claim.

I must also enter summary judgment in favor of the defendants and against Mr. Gillis and Mr. Sargeni on their early retirement benefits claim because the Rule of 85 was not an accrued benefit. Further, Mr. Gillis, Mr. Sargeni and the class members cannot prevail on their reporting and disclosure claim because they suffered no harm. Finally, because there is no longer a viable federal claim, there is no longer subject matter jurisdiction, and I must dismiss this matter.

An order follows.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-1879

LEONARD GILLIS, for themselves and
all others similarly situated, as a class;
VALDO A. SARGENI, for themselves and
all others similarly situated, as a class;

v.

HOECHST CELANESE CORPORATION;
HOECHST CELANESE RETIREMENT PLAN,
a federal employee pension benefit plan and trust,

Third-Party Plaintiffs

v.

AMERICAN MIRREX CORPORATION,
a Delaware Corporation;
AMERICAN MIRREX RETIREMENT PLAN,
a federal employee benefit plan and trust,

Third-Party Defendants

Leonard Gillis and Valdo Sargeni, for themselves and all
others similarly situated,

Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and SEITZ, *Circuit Judges*

The petition for rehearing filed by appellants and the petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied. Judge Becker and Judge Stapleton would have granted appellees' petition for rehearing.

By the Court,

/s/
Circuit Judge

Dated: October 6, 1993

APPENDIX D

RELEVANT STATUTORY PROVISIONS

ERISA Sections 204(f) and (g)

§ 204. Benefit accrual requirements.

. . .

(f) Employer treated as maintaining a plan. For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan. (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B)(other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409(a) of the Internal Revenue Code of 1986), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of such Code)

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

ERISA Section 208

§ 208. Mergers and consolidations of plans or transfers of plan assets.

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had been terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of this Act applies.